Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DARYL THOMAS McARTHUR,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Second District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is society prepared to recognize as reasonable one's expectation of privacy in his subscriber information and record of calls made which is maintained by a telephone company and, thus, that obtaining such information by the government constitutes a "search" under the Fourth Amendment?

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OPINION BELOW

The decision of the Court of Appeals for the Second District of Texas was rendered on August 30, 1999, and is reported at *McArthur v. State*, 1 S.W.3d 323 (Tex. App. – Fort Worth 1999, pet. ref'd). Rehearing was overruled October 7, 1999. This opinion is reproduced in Appendix A to this Petition.

The Order of the Texas Court of Criminal Appeals refusing Appellant's Petition for Discretionary Review was entered April 5, 2000. The unpublished order is reproduced in Appendix B to this Petition.

JURISDICTION

The Texas Court of Criminal Appeals is the highest court in Texas that hears criminal cases. The Court of Criminal Appeals refused to grant discretionary review to examine the issue of whether Petitioner's rights guaranteed under the Fourth Amendment to the United States Constitution were violated. This issue was decided adversely to Petitioner by the lower appellate court. The Court of Criminal Appeals' order of refusal was issued April 5, 2000. The jurisdiction of this Court is invoked under 28 U.S.C § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. § 2703(c)(1)(B) states as follows:

(B) A provider of electronic communication service or remote computing service shall disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a) or (b) of this section) to a governmental entity only when the governmental entity –

(i) obtains a warrant issued under the Federal Rules of Criminal Procedure or equivalent State warrant;

(ii) obtains a court order for such disclosure under subsection (d) of this section;

(iii) has the consent of the subscriber or customer to such disclosure; or

(iv) submits a formal written request relevant to a law enforcement investigation concerning telemarketing fraud for the name, address, and place of business of a subscriber or customer of such provider, which subscriber or customer is engaged in telemarketing (as such term is defined in section 2325 of this title.)

18 U.S.C. § 3121(a) states as follows:

(a) In general. – Except as provided in this section, no person may install or use a pen register or a trap and trace device without first obtaining a court order under section 3123 of

this title or under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.).

STATEMENT OF THE CASE

This case presents the question of whether, for purposes of the Fourth Amendment, a person has a reasonable expectation of privacy in telephone subscriber and billing information that is maintained by the telephone company, including, specifically, the numbers he dials from his home. The case of *Smith v. Maryland*, 442 U.S. 735 (1979) holds that he does not. Petitioner asks that this Court re-examine *Smith* in light of several factors that show society recognizes that such an expectation of privacy is reasonable.

I. The Facts.

On July 10, 1997, Petitioner telephoned a crisis operator at the Denton County (Texas) Mental Health and Mental Retardation Department ("MHMR"). Petitioner stated to the person answering the phone that he had "fondled" his twelve-year-old daughter. From Petitioner's tone and the nature of the conversation, the operator felt that someone, possibly Petitioner, was in danger. The operator temporarily placed Petitioner on hold and called the police to trace the call. While he was on hold, Petitioner hung up.

Later that same day, Petitioner called MHMR again. Another operator answered. After a brief conversation, Petitioner abruptly hung up. This operator also requested

that the police trace the call, as Petitioner had said he thought about killing himself. The next day, Petitioner called again, and again the police were asked to trace the call.

MHMR's requests that the calls be traced was forwarded to the Denton Police Department ("DPD"). The DPD, in turn, requested General Telephone Electric ("GTE") to trace the calls. GTE traced the calls to Petitioner's place of employment. Once it was deduced that Petitioner was the one who had made the calls, he was detained and confessed to sexually abusing his daughter. He was charged with Indecency With a Child, a second degree felony.

II. The Proceedings Below.

In the trial court, petitioner moved to suppress the evidence of the phone calls, arguing, *inter alia*, that the evidence was obtained through an "illegal search" in violation of the Fourth Amendment to the United States Constitution. *See McArthur*, 1 S.W.3d at 327-28. The motion was overruled and the evidence was admitted at Petitioner's trial. Petitioner was convicted and sentenced to ten years probation. *See id.* at 327.

Petitioner appealed his conviction to the Court of Appeals for the Second District of Texas. One of the grounds for the appeal was that the trial court erred by overruling his motion to suppress and admitting the evidence of the phone records at trial. *See id.* at 328. In an opinion issued August 30, 1999, the court of appeals denied relief on this ground on the basis of this Court's

opinion in *Smith v. Maryland*, 442 U.S. 735 (1979). *See McArthur*, 1 S.W.3d at 329. Relying on *Smith*, the court specifically held that Petitioner had no reasonable expectation of privacy in "the electric impulses indicating the transmission or reception of received telephone communications . . . ." *Id.* The court went on to state that "telephone subscribers have no reasonable expectation that records of their calls will not be made and that those records will not be disclosed." *Id.* (citing *United States v. Clegg*, 509 F.2d 605, 610 (5th Cir. 1975)).

After motion for rehearing was denied by the court of appeals, Petitioner timely filed a petition for discretionary review with the Texas Court of Criminal Appeals. The petition was refused April 5, 2000.

REASONS FOR GRANTING CERTIORARI

Twenty-one years ago, in *Smith v. Maryland*, 442 U.S. 735 (1979), this Court held that the use of a pen register was not a "search" for purposes of the Fourth Amendment. The crux of this Court's reasoning was that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Id.* at 743-44. The rationale was that by the very act of using the telephone, a person assumes the risk that any information generated by that use (e.g., numbers dialed, billing records, personal information) would be divulged to the police. *See id.* at 745. This Court ultimately held that society did not recognize any such expectation of privacy as legitimate.

Petitioner believes that the rationale of *Smith* – that society is not prepared to recognize a reasonable expectation of privacy in this type of information – can no longer be supported. Through a survey of the decisions from the highest courts of other states that *do* recognize an expectation of privacy in one's phone records, it is obvious that reasonable minds have begun to differ on the issue. In addition, Congress has in a number of different ways recognized the importance of one's privacy rights regarding such records.

It is very clear from a reading of the majority opinion in *Smith* that the Court felt that there is no way that a rational person could assume that his phone records, including the numbers he dialed, would not be subject to disclosure. Petitioner would submit that the past two decades have demonstrated this premise to be incorrect. Inasmuch as *Smith v. Maryland* was based upon this premise, Petitioner would respectfully assert that it should be revisited.

I. A Review of *Smith v. Maryland*.

In *Smith v. Maryland*, 442 U.S. 735 (1979), this Court held that a pen register is not a "search" for purposes of the Fourth Amendment. *See id.* at 745-46. In doing so, the Court employed the two-prong analysis enunciated by Justice Harlan in *Katz v. United States*, 389 U.S. 347 (1967), that, in order for an "expectation of privacy" to be "reasonable" under the Fourth Amendment, (1) a person must exhibit an actual expectation of privacy (the "subjective prong"), and (2) that expectation must be one that "society is prepared to recognize as reasonable." *Id.* at 740

(quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)). After a factual analysis of telephone billing practices and the manner in which calls are made and traced, this Court questioned whether the petitioner actually had a real subjective expectation of privacy at all in the numbers he dialed from his phone. *See id.* at 742-43. Using the same analysis, this Court then went on to find that even if the petitioner had a subjective expectation of privacy, it was "not one that society was prepared to recognize as reasonable." *Id.* at 743-45.

The *Smith* majority reasoned that "[a]ll telephone users realize that they must convey phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed." *Id.* at 742. "All subscribers realize," the Court continued, "that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills." *Id.* The Court further observed that pen registers "are routinely used by telephone companies 'for purposes of checking billing operations, detecting fraud and preventing violations of the law.' " *Id.* (quoting *United States v. New York Tel. Co.*, 434 U.S. 159, 174-75 (1977)). The Court concluded that "[t]elephone users, in sum, typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes." *Id.* at 743.

The Court went on to note that the petitioner had "assumed the risk," by making a phone call, that the information collected by the pen register would be turned

over to the police. *See id.* at 743-44. "When he used his phone," the Court concluded, "petitioner voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business. In so doing, petitioner assumed the risk that the company would reveal to police the numbers he dialed." *Id.* at 744. The Court compared this situation to that where a depositor at a bank voluntarily turns over financial information to the bank. *See id.* (citing *United States v. Miller*, 425 U.S. 435, 443 (1976)). Based upon this reasoning, the Court concluded that even if the petitioner had a subjective expectation of privacy, that this expectation was not one that society was prepared to call "reasonable." *See id.* at 745-46.

II. The rationale of the *Smith v. Maryland* decision has been sharply criticized by courts and commentators.

The *Smith* decision has had its share of detractors. In his dissent in *Smith*, Justice Marshall took the majority to task for imputing to the average telephone subscriber quite a bit of detailed information about pen registers and their uses as well as telephone company internal procedures and billing processes. *See id.* at 748-49 (Marshall, J., dissenting). He then went on to consider the proposition that the petitioner had "assumed the risk" of disclosure of the information to the police. *See id.* at 749. Justice Marshall first observed that any "assumption of risk" analysis should also examine the person's ability to choose to divulge the information. *See id.* "Implicit in the concept of assumption of risk is some notion of choice," Justice Marshall began. *Id.* "At least in the third-party

consensual surveillance cases, which first incorporated risk analysis into Fourth Amendment doctrine, the defendant presumably had exercised some discretion in deciding who should enjoy his confidential communications." *Id.* (citing *United States v. White*, 401 U.S. 745, 751-52 (1971); *Hoffa v. United States*, 385 U.S. 293, 302-03 (1966); *Lopez v. United States*, 373 U.S. 427, 439 (1963)).

Justice Marshall noted that people really have no realistic choice but to use the telephone in this day and age; therefore, the person is compelled to "assume the risk" of disclosure. *See id.* at 750. "It is idle to speak of 'assuming' risks in contexts where, as a practical matter, individuals have no realistic alternative." *Id.* Quoting Justice Harlan from an earlier opinion, Justice Marshall stated, " '[W]e should not . . . merely recite . . . risks without examining the desirability of saddling them upon society.' " *Id.* at 750 (quoting *White*, 401 U.S. at 786 (Harlan, J., dissenting)). "In making this assessment," Justice Marshall continued, "courts must evaluate the 'intrinsic character' of investigative practices with reference to the basic values underlying the Fourth Amendment." *Id.* (citing *California Bankers Assn. v. Shultz*, 416 U.S. 21, 95 (1974) (Marshall, J., dissenting)). "And for those 'extensive intrusions that significantly jeopardize [individuals'] sense of security, . . . more than self-restraint by law enforcement officials is required.' " *Id.* (quoting *White*, 401 U.S. at 786 (Harlan, J., dissenting)). Justice Marshall felt that a phone subscriber should be entitled to assume that the numbers he dials from his home would, at most, be kept by the phone company for its own internal uses and not just be freely given to the police. *See id.* at 752.

A. The *Smith* decision has been criticized by commentators virtually since its inception.

Professor Wayne LaFave agrees with Justice Marshall that the mere fact that a telephone user may know the telephone company can monitor his calls for internal reasons does not necessarily mean that he expects the information to be passed on to others. He analyzes *Smith* at length in his treatise, SEARCH AND SEIZURE:

> "Under *Smith*, the police may, without any cause whatsoever and for whatever purpose they choose, uncover private relationships with impunity merely because the telephone company might under some circumstances for certain limited purposes make a record of such relationships for the company's own use. Indeed, it is enough for the majority in *Smith* that the telephone company has the capacity to make a record of such relationships, even though the company has the good sense not to offend its subscribers by making or keeping those records for no reason."

1 LAFAVE, SEARCH AND SEIZURE § 2.7(b) at 507 (2d ed. 1987).

Professor LaFave analyzes the notion of "assumption of risk" by divulgence of information to third parties in much the same way that Justice Marshall did – by examining the realities surrounding how we conduct our day to day lives. Unless a person lives as a complete recluse, he must divulge information – a little bit here, a little bit there – in order to function in society. LaFave goes on at length to say:

It was clear even before *Katz* that the protections of the Fourth Amendment extend to certain matters which are not absolutely, 100% private. Thus, even though a tenant may not have absolute privacy in his home because the landlord may enter "to view waste," the Supreme Court did not hesitate to hold that the residence is protected by the Fourth Amendment from police intrusion even with the landlord's permission. [citing *Chapman v. United States*, 365 U.S. 610 (1961)]. Similarly a person who rents a hotel room cannot be said to have absolute privacy in that room, for he gives "implied or express permission" to "such persons as maids, janitors or repairmen" to enter his room "in the performance of their duties," but this certainly does not mean that a hotel room is not protected by the Fourth Amendment against unreasonable police entry. [citing *Stoner v. California*, 376 U.S. 483 (1964)].

Katz did not overrule those decisions, but rather extended them to situations in which no physical trespass is necessary for the police to obtain that which an individual sought to preserve as private. This being so, it makes no sense to say that the telephone subscriber (any more than the tenant or the hotel occupant) is fair game for unrestrained police scrutiny merely because he has surrendered some degree of his privacy for a limited purpose to those with whom he is doing business. As Professor Amsterdam put it, "[T]he fact that our ordinary social intercourse, uncontrolled by government, imposes certain risks upon us hardly means that government is constitutionally unconstrained in

> adding to those risks." [citing Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 406 (1974)].

LAFAVE, *supra*, at 508.

Another noted commentator agrees with Professor LaFave that the majority in *Smith* "failed to appreciate, or to adequately discuss, several considerations" surrounding the relationship between a telephone company and its subscribers. *See* C. FISHMAN, WIRETAPPING AND EAVESDROPPING § 28.1(2) at 251-52 (Supp. 1992). Recognizing that ordinary telephone companies do not make records of local numbers dialed from a telephone, Fishman believes it "strains logic" to hold that an individual should expect and assume the risk that such a record would be made at the request of the police. *See id.* at 252. Additionally, it "is inappropriate to speak of a telephone user assuming the risk of pen register surveillance, since the user has no practical alternative but to forego the use of the telephone altogether." *Id.*

B. Several state courts have refused to follow *Smith*, thereby creating a conflict with the states such as Texas that do.

Numerous state courts have refused to follow *Smith*, albeit often times on state grounds. For instance, the Supreme Court of Colorado in *People v. Sporleder*, 666 P.2d 135 (Colo. Sup. Ct. 1983) held that under the Colorado Constitution a telephone subscriber has a legitimate expectation that the telephone numbers dialed from a home phone will remain private and that in the absence of exigent circumstances law enforcement officers must

have a search warrant supported by probable cause prior to the installation of a pen register. *See id.* at 139-40. In *State v. Gunwall*, 720 P.2d 808 (Wash. Sup. Ct. 1986), the Supreme Court of Washington held, "The privacy interests of citizens which are protected by [the Washington state constitution] prevent the defendant's long distance telephone records from being obtained from the phone company, or any pen register from being installed on her telephone connections without a search warrant." *Id.* at 813. The Supreme Court of Idaho has held that the installation of a pen register on a defendant's telephone is a search under the state constitution. *See State v. Thompson*, 760 P.2d 1162, 1164-65 (Idaho Sup. Ct. 1988).

In *Rothman v. State*, 779 P.2d 1 (Hawaii Sup. Ct. 1989), the Supreme Court of Hawaii held that "persons having private telephone lines have a reasonable expectation of privacy with respect to the communication of the numbers they call, and the numbers of incoming calls, and the seizure of those numbers by the government, without a warrant, would violate such person's right to privacy." *Id.* at 7. In *People v. Blair*, 602 P.2d 738 (Cal. Sup. Ct. 1979), the California Supreme Court held that "a hotel guest may reasonably expect that the calls he makes from his room are recorded by the hotel for billing purposes only, and will not be disclosed to others without legal process." *Id.* at 746. The Superior Court of Pennsylvania has held that "an individual's expectation of privacy in telephone numbers he calls is reasonable, legitimate, and is protected by the State Constitution against government surveillance and intrusion without probable cause." *Commonwealth v. Beauford*, 475 A.2d 783, 791 (Sup. Ct. 1984).

One state court in particular has refused to follow *Smith* on federal as well as state grounds. The Supreme Court of New Jersey, in *State v. Hunt*, 450 A.2d 952 (N.J. Sup. Ct. 1982), echoed the sentiments of the *Smith* dissenters in coming to the conclusion that the rule of *Smith* would not be followed in New Jersey:

> The telephone caller is "entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Katz*, 389 U.S. at 352. Similarly, he is entitled to assume that the numbers he dials in the privacy of his home will be recorded solely for the telephone company's business purposes. From the viewpoint of the customer, all the information which he furnishes with respect to a particular call is private. The numbers dialed are private. The call is made from a person's home or office, locations entitled to protection under the Fourth Amendment and Article 1, par. 7 of the New Jersey Constitution. . . .
>
> It is unrealistic to say that the cloak of privacy has been shed because the telephone company and some of its employees are aware of this information. Telephone calls cannot be made except through the telephone company's property and without payment to it for the service. This disclosure has been necessitated because of the nature of the instrumentality, but more significantly the disclosure has been made for a limited business purpose and not for release to other persons for other reasons. The toll billing record is a part of the privacy package.

Id. at 346-48; *see also, id.* at 348 (citing several other state cases breaking from the *Smith* rule).

Several states have refused to follow the rationale of *Smith v. Maryland*, while other states, such as Texas, continue to follow it. Supreme Court Rule 10(b) contemplates this Court settling such disputes among the states. This case is well suited for the Court to exercise its discretion to do so.

III. In the time since *Smith* was handed down, Congress has enacted laws that demonstrate that a reasonable expectation of privacy in telephone records does, in fact, exist.

Seven years after *Smith* was handed down, Congress passed the Electronic Communications Privacy Act of 1986, Pub. L. 99-508, Oct. 21, 1986. This Act created several new sections in the United States Code, many of them demonstrating a clear intent that one should assume privacy in one's use of the telephone. For instance, 18 U.S.C. § 2703 generally restricts governmental access to a subscriber's personal information or billing records in the absence of a warrant, subpoena, or court order. *See id.*, § 2703(c)(1)(B). 18 U.S.C. § 3121 is a general prohibition on pen registers and trap and trace devices in the absence of a court order. *See id.*, § 3121(a).

As telling as the very existence of these statutes is to the fact that Congress recognizes a right to privacy in telephone subscriber information, the Senate made this recognition crystal clear in the legislative history accompanying the Act:

> When the Framers of the Constitution acted to guard against the arbitrary use of Government power to maintain surveillance over citizens, there were limited methods of intrusion

into the "houses, papers, and effects" protected by the fourth amendment. During the intervening 200 years, development of new methods of communication and devices for surveillance has expanded dramatically the opportunity for such intrusions.

The telephone is the most obvious example. Its widespread use made it technologically possible to intercept the communications of citizens without entering homes or other private places. When the issue of Government wiretapping first came before the Supreme Court in *Olmstead v. United States*, 277 U.S. 438 (1928), the Court held that wiretapping did not violate the fourth amendment, since there was no searching, no seizure of anything tangible, and no physical trespass.

Today, the *Olmstead* case is often remembered more for Justice Brandeis' prescient dissent than for its holding. Justice Brandeis predicted: 'Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home . . . . Can it be that the Constitution affords no protection against such invasions of individual security?"

S. Rep. 99-541, 99th Cong., 2nd Sess. 1986, Oct. 17, 1986.

Congress continues to address the privacy of telephone information as new technologies arise. For instance, for a few years now, "Caller ID" has been available. In S. Rep. 102-247, 102nd Cong., 1st Sess. Nov. 26, 1991, (accompanying The Telephone Privacy Act of 1991),

the Senate observed that the new service could adversely affect privacy:

> Without [Caller ID blocking], anyone who places a call within, or into, any State with Caller ID risks having his number disclosed – on a random basis and without his knowledge. With the aid of reverse directories the call recipient could also have access to the caller's name and home address.
>
> There are a variety of situations in which callers need and deserve to keep their phone numbers to themselves. Battered women who take refuge at shelters should be able to call home to check on things without disclosing the shelter's location. Informants ought to feel free to call the police with an anonymous tip. Individuals are entitled to contact a crisis hotline or their Senator's office, or the IRS, or the FBI, to ask for help without having to say who they are. People who choose to have unlisted numbers should be able to keep their numbers private for any reason.

Id.

Through its debate and its passage of these types of laws, it is clear that Congress recognizes a *right* to privacy not only in the content of phone conversations, but in subscriber and billing information as well. Of particular note is the fact that "assumption of risk" plays no part in Congress' analysis of this right to privacy.

CONCLUSION

The *Katz* Court, in doing away with the thirty-nine year old rationale of *Olmstead*, recognized that the "trespass doctrine" it enunciated could no longer withstand constitutional scrutiny. *See Katz*, 389 U.S. at 353. The "assumption of risk" doctrine as it was employed in *Smith v. Maryland* should be re-examined to see whether it is likewise constitutionally suspect. Petitioner prays that this Court will grant his petition for writ of certiorari and re-examine the rationale of *Smith v. Maryland*.

Respectfully submitted,

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APPENDIX A

Court of Appeals of Texas,
Fort Worth.

Daryl Thomas McARTHUR, Appellant,

v.

The STATE of Texas, Appellee.

No. 2-98-482-CR.

Aug. 30, 1999.
Rehearing Overruled Oct. 7, 1999.

Fred Marsh, Denton, for Appellant.

Bruce Isaacks, Criminal District Attorney, and Pamela J. Moore, Michael Moore, and Paige McCormick, Assistants, Denton, for Appellee.

Panel B: LIVINGSTON, BRIGHAM, and HOLMAN, JJ.

OPINION

TERRIE LIVINGSTON, Justice.

In twelve points, appellant Daryl Thomas McArthur appeals from his conviction on two counts of indecency with a child. In points one through four, he argues that the trial court erred by failing to suppress evidence obtained as a result of his telephone calls being traced. In his remaining points, appellant argues that several conditions of his community supervision are improper. Because we determine that there was no error in the trial court's failure to suppress the evidence, we overrule appellant's first four points. Because we conclude that the

second sentence of term (gg) and all of term (ll) of appellant's community supervision were improper, we delete those terms and affirm the trial court's imposition of all other conditions of probation.

I. BACKGROUND

On July 10, 1997, appellant telephoned a crisis operator at the Denton County Mental Health and Mental Retardation Department ("MHMR"). In that conversation, appellant stated that he had fondled his twelve-year-old daughter. From appellant's tone and the nature of the conversation, the operator felt that someone, possibly appellant, was in danger. As a result, she temporarily placed appellant on hold and requested that the Denton Police Department (DPD) trace the call. While on hold, appellant hung up. The operator then reported the possible assault to Child Protective Services.

Later that same day, appellant called MHMR again. Kathleen Kern, another operator, answered. After a brief conversation, appellant abruptly hung up. Kern also requested that the call be traced because appellant had told her he thought about killing himself. Appellant called the following day and again spoke briefly with Kern. As before, Kern requested that the called be traced.

MHMR recorded the content of the first two conversations. MHMR's requests that the calls be traced was forwarded to the DPD. DPD, in turn requested General Telephone Electric (GTE) to trace the calls. GTE traced the calls to Services Programs for Aging Needs (SPAN), a nonprofit agency that provides busing and other services in Denton County.

Detective Bryan Lee then met with two SPAN supervisors and determined appellant's identity from MHMR's recordings and that he lived in nearby Argyle. Detective Lee referred the case to Tom Tackett of the Argyle Police Department, who began an investigation. Tackett interviewed appellant, at which time appellant admitted that he had fondled his daughter on three or four occasions. In a separate interview, appellant's daughter corroborated appellant's admission.

Appellant was charged with two counts of indecency with a child. He moved to suppress all evidence obtained as a result of the phone calls being traced. The trial court overruled appellant's motion to suppress, and appellant was convicted of both counts and placed on ten years' community supervision. This appeal followed.

II. SUPPRESSION OF EVIDENCE

In points one through four, appellant argues that the trial court erred by failing to suppress evidence obtained as a result of his phone calls being traced.[1] Specifically, appellant contends in point one that a "trap and trace"[2] device was used and that its use was an unreasonable search under the Fourth Amendment. In point two, he

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[1] Appellant does not complain of MHMR's recording of the conversations.

[2] Absent enumerated exceptions, a "trap and trace device" means a device that records an incoming electronic or other impulse that identifies the originating number of an instrument or device from which a wire or electronic communication was transmitted. *See* tex.Code Crim. Proc. Ann. art. 18.21, § 1(7) (Vernon Supp.1999).

argues that the trace was an unreasonable search under the Texas Constitution and that the subsequent admission of evidence obtained as a result of the trace was a violation of article 38.23 of the code of criminal procedure. In point three, he argues that the trace violated section 16.03 of the penal code and in point four, he contends the trace violated article 18.21 of the code of criminal procedure.

A. Standard of Review

In *Guzman v. State*, 955 S.W.2d 85 (Tex.Crim. App.1997), the court of criminal appeals clarified the standard of review to be used by appellate courts in reviewing a trial court's order on a motion to suppress evidence obtained through a search incident to a warrantless arrest. *Id.* at 87-89. In *Loserth v. State*, 963 S.W.2d 770 (Tex.Crim.App.1998), the court of criminal appeals stated that the Guzman construct applied to all motions to suppress. *Id.* at 771.

Determination of the appropriate standard of appellate review depends on the type of question presented. *See Guzman*, 955 S.W.2d at 87-89. Guzman recognizes three types of questions: (1) historical facts that the record supports, especially when the trial court's fact findings are based on an evaluation of credibility and demeanor; (2) application of law to fact questions, i.e., mixed questions of law and fact, when the ultimate resolution of those questions turns on an evaluation of credibility and demeanor; and (3) mixed questions of law and fact when the resolution of those questions does not turn on an evaluation of credibility and demeanor. *See id.* at 89; *see also Loserth*, 963 S.W.2d at 772. In reviewing the

first two categories of questions, an appellate court should show "almost total deference" to a trial court's determination because of a trial court's exclusive fact-finding role and because a trial court is in an appreciably better position to decide the issue. *Guzman*, 955 S.W.2d at 89. In reviewing the third type of question, where the resolution of the issue does not turn on an evaluation of credibility and demeanor, an appellate court is in as good a position to review the issue as the trial court; therefore, an appellate court determines the issue independently, or de novo. Because the historical facts in the present case are not in dispute, the proper standard of review is de novo. *See Loesch v. State*, 958 S.W.2d 830, 831-32 (Tex.Crim.App.1997); *Guzman*, 955 S.W.2d at 87.

B. Fourth Amendment

For Fourth Amendment purposes, the issue in this case is whether appellant could have a "justifiable, reasonable, or legitimate expectation of privacy" in the information revealed when his telephone calls were traced. *See Smith v. Maryland*, 442 U.S. 735, 741, 99 S.Ct. 2577, 2581, 61 L.Ed.2d 220 (1979). Determination of a privacy interest requires an examination of two issues: whether appellant, by his conduct, "has exhibited an actual (subjective) expectation of privacy" and whether this subjective expectation of privacy is one which "society is prepared to recognize as 'reasonable.' " *Id.* at 740, 99 S.Ct. at 2580.

The Supreme Court has unequivocally stated that the electronic impulses indicating the transmission or reception of received telephone communications are automatically and voluntarily conveyed to the telephone

company; thus, no legitimate expectation of privacy exists. *See id.* at 744-45, 99 S.Ct. at 2582. This, in large part, is based on the fact that telephone subscribers have no reasonable expectation that records of their calls will not be made and that those records will not be disclosed. *See United States v. Clegg*, 509 F.2d 605, 610 (5th Cir.1975). Fourth Amendment protection extends only to the content of a telephone conversation and not the fact that a call was placed or that a particular number was dialed. *See Smith*, 442 U.S. at 744-45, 99 S.Ct. at 2582-83.

Here, GTE monitored only the electronic impulses indicating the origin of the incoming calls; nothing else was noted. Consequently, appellant has no legitimate expectation of privacy; therefore, this was not a search proscribed by the Fourth Amendment. We overrule point one.

C. Article I, Section 9

In point two, appellant argues the trial court erred by admitting evidence seized in violation of his state constitutional guarantee against unreasonable searches. That is, he argues the trace violates article I, section 9 of the Texas Constitution and because it does, it also violates article 38.23 of the code of criminal procedure, the statutory exclusionary rule. *See* Tex. Const. art. I, § 9; Tex.Code Crim. Proc. Ann. art. 38.23 (Vernon Supp.1999). He cites us to *Richardson v. State*, 865 S.W.2d 944 (Tex.Crim. App.1993) for the proposition that a "pen register"

may be a search under the Texas Constitution.[3] The State concedes that under the state constitution a legitimate privacy interest may exist in phone records, but it contends appellant has no standing to complain because the privacy interest in the phone records belongs to appellant's employer. We agree.

The purpose of both the Fourth Amendment and article I, section 9 is to safeguard an individual's legitimate expectation of privacy from unreasonable governmental intrusions. *See Green v. State*, 566 S.W.2d 578, 582 (Tex.Crim.App.1978). Those safeguards protect people not places. *See id.*

Under this approach, the substantive question of what is a search is effectively merged into the procedural question of "standing" to challenge such a search. *See Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978); *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex.Crim.App.1996). It is now a matter, not only of whether the government has breached some "reasonable," "justifiable," or "legitimate expectation of privacy" that existed in a particular place, *Katz v. United States*, 389 U.S. 347, 351-53, 88 S.Ct. 507, 511-12, 19 L.Ed.2d 576 (1967), but also of who reasonably, justifiably, or legitimately harbored that expectation. *See Chapa v. State*, 729

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[3] We note that Richardson dealt with a "pen register" rather than a "trap and trace" device. The distinction is that a pen register records the numbers that are dialed from a specific phone, whereas a "trap and trace" device identifies the number from which a call was placed. Despite the distinction, for the reasons enunciated in *Richardson*, use of a "trap and trace" device may constitute a search under article I, section 9. *Cf. Richardson*, 865 S.W.2d at 953-54.

S.W.2d 723, 727 (Tex.Crim.App.1987). Furthermore, the accused has the burden of proving facts establishing a legitimate expectation of privacy. *See Calloway v. State*, 743 S.W.2d 645, 650 (Tex.Crim.App.1988).

In this case, the record does not indicate that appellant had a subjective belief that the numbers dialed from SPAN's telephone were private. While appellant may not have anticipated that his calls could or would be traced, more is required to establish a subjective expectation of privacy. Furthermore, appellant has failed to establish that his subjective interest, if any, was one that society would recognize as reasonable.[4] Accordingly, we overrule point two.

D. Penal Code & Code of Criminal Procedure

In points three and four, appellant argues the "trap and trace device" used violated section 16.03 of the penal

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[4] Appellant has also not established standing under article 38.23. *See Fuller v. State*, 829 S.W.2d 191, 202 (Tex.Crim.App.1992), *cert. denied*, 508 U.S. 941, 113 S.Ct. 2418, 124 L.Ed.2d 640 (1993). Since the predecessor of article 38.23(a) was first enacted in 1925, the court of criminal appeals has repeatedly held that "standing" is a necessary prerequisite to "[t]he right to complain because of an illegal search and seizure is a privilege personal to the wronged or injured party, and is not available to anyone else." *Id.* (quoting *Craft v. State*, 107 Tex.Crim. 130, 295 S.W. 617, 618 (1927)).

Article 38.23(a) does not confer third party standing to persons accused of crimes, such that they may complain about the receipt of evidence that was obtained by violation of the rights of others, no matter how remote in interest from themselves. *See Fuller*, 829 S.W.2d at 202.

code and article 18.21 of the code of criminal procedure. *See* tex. Penal Code Ann. § 16.03 (Vernon 1994 & Supp.1999); Tex.Code Crim. Proc. Ann. art. 18.21. As a consequence, he contends that article 38.23 requires that the evidence obtained must be suppressed. Relying on the statutory definition of a "trap and trace device," the State argues that there is no evidence that such a device was used.

The definition of trap and trace found in article 18.21 governs appellant's complaints:

> (7) "Trap and trace device" means a device that records an incoming electronic or other impulse that identifies the originating number of an instrument or device from which a wire or electronic communication was transmitted. The term does not include a device or telecommunications network used in providing:
>
> . . . .
>
> (B) the services referenced in Section 3.302(g), Public Utility Regulatory Act of 1995 (Article 1446c-0, Vernon's Texas Civil Statutes)[.]

tex.Code Crim. Proc. Ann. art. 18.21, § 1(7)(B) (emphasis added).

Section 3.302(g) of the Public Regulatory Act references "an identification service provided in connection with a '700,' '800,' or '900' access code telecommunications service."[5]

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[5] *See* Act of Mar. 29, 1995, 74th Leg., R.S., ch. 9, § 2, 1995 Tex. Gen. Laws 31, 87, amended by Act of May 8, 1997, 75th Leg., R.S., ch. 166, § 1, 1997 Tex. Gen. Laws, 715, 841 (current version at TEX. UTIL.CODE ANN. § 55.102(b)(5) (Vernon 1998)).

In this case, MHMR's crisis hot line was an 800 number. Because article 18.21 specifically excludes from the definition of "trap and trace" identification services provided in connection with 800 telephone numbers, GTE's trace was not in violation of any statute. We overrule points three and four.

III. TERMS AND CONDITIONS OF PROBATION

In his remaining points, appellant challenges numerous terms and conditions of his community supervision:

> (h) Permit the supervision officer to search your residence, any vehicle you have access to, and any of your possessions for the presence of sexually explicit materials or materials prohibited by these terms and to seize said materials. Such materials seized shall be considered property of the court and shall be safely kept by the supervision officer until called for by the court;
>
> . . . .
>
> (j) Do not accept or maintain employment which brings you into contact with children under 18 years of age, unless approved by the supervision officer;
>
> . . . .
>
> (y) Submit to urinalysis tests for alcohol or drug usage at the request of the supervision officer and pay for the cost of these tests within 10 days of giving the specimen;
>
> . . . .
>
> (aa) Submit to clinical polygraph testing and ABEL assessment testing in order to assist in

determining whether you are in compliance with your supervision terms and treatment guidelines. These tests will be administered as directed by the Supervision office and sex offender treatment provider. You must pay all costs of such testing.

(bb) Have no direct or indirect contact with the victim. . . .

. . . .

(ff) Do not possess any printed, photographed, or recorded sexually stimulating or sexually oriented material as deemed inappropriate by the supervision office and your counselor or treatment provider, nor go on the premises of or patronize any place where such material or entertainment is available;

(gg) Do not subscribe to or use any on-line computer services or computer bulletin board systems, either at home or work, unless approved in advance by the supervision officer. Allow the supervision officer to inspect and search all computers and electronic instruments with a modem or device used for the specific purpose of receiving or transmitting electronic data, as well as all disks and other storage systems;

. . . .

(ii) Do not reside, go in, go on, or go within a distance of 1000 feet of a premises where children commonly gather, including a school, day-care facility, playground, public or private youth center, public swimming pool, or video arcade facility, unless all living arrangements or other exceptions have been reported to and approved by the supervision officer;

> (jj) Do not reside in a household with children under eighteen (18) years of age unless approved in advance by the supervision officer, including the residence of the victim . . . ;
>
> (kk) Have no contact with children under eighteen (18) years of age, including members of your own household, unless a designated chaperone is present and supervising the contact. A "designated chaperone", excluding [appellant's wife], is a person who has completed a required education program and who is approved by the supervision officer with the agreement of your counselor or treatment provider;
>
> (ll) Upon request of the supervision officer, notify all persons residing at your address, your neighbors, your employer, or other significant person that you are a registered sex offender and the nature of the offense;
>
> . . . .
>
> (nn) Defendant is to participate until released by the court in NCIA House Arrest Program beginning on or before 30 days from release from the Denton County Jail. The defendant is to be confined to his home at all times that he is not performing court-approved activities. Defendant is to abide by the written schedule given to him by [the] supervision officer and is not to tamper with the electronic device in any manner.

We review a trial court's imposition of community supervision conditions under an abuse of discretion standard. *See LeBlanc v. State*, 908 S.W.2d 573, 574 (Tex.App. – Fort Worth 1995, no pet.). Article 42.12, section 11 of the code of criminal procedure permits a trial judge to

"impose any reasonable condition . . . designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant." tex.Code Crim. Proc. Ann. art. 42.12, § 11(a) (Vernon Supp.1999); *see also Tamez v. State*, 534 S.W.2d 686, 691 (Tex.Crim.App.1976) (noting a condition should "have a reasonable relationship to the treatment of the accused and the protection of the public"). In addition, because appellant was convicted of indecency with a child, sections 13B and 14 also apply. *See* Tex.Code Crim. Proc. Ann. art. 42.12, § 13B (community supervision for sexual offenses against children), § 14 (community supervision for child abusers and sex offenders).

To be invalid, a condition of community supervision must (1) have no relationship to the crime; (2) relate to conduct that is not in itself criminal; and (3) forbid or require conduct that is not reasonably related to the future criminality of the defendant or does not serve the statutory ends of probation. *See Marcum v. State*, 983 S.W.2d 762, 768 (Tex.App. – Houston [14th Dist.] 1998, pet. ref'd); *Lacy v. State*, 875 S.W.2d 3, 5 (Tex.App. – Tyler 1994, pet. ref'd); *Simpson v. State*, 772 S.W.2d 276, 280-81 (Tex.App. – Amarillo 1989, no pet.). If the trial court imposes an invalid condition of probation, the proper remedy is to reform the judgment by deleting the invalid condition. *See Martinez v. State*, 874 S.W.2d 267, 268 (Tex.App. – Houston [14th Dist.] 1994, pet. ref'd) (citing *Ex parte Pena*, 739 S.W.2d 50, 51 (Tex.Crim.App.1987)).

A. Unreasonable Searches and Seizures

In points five and nine, appellant argues that conditions (h) and (gg) violate his right to be secure from unreasonable searches and seizures. He argues that *United States v. Consuelo-Gonzalez*, 521 F.2d 259 (9th Cir.1975) and Tamez clearly prohibit such "search" conditions.

Without question, a probationer has the right to enjoy a significant degree of privacy. *See Lee v. State*, 952 S.W.2d 894, 904 (Tex.App. – Dallas 1997, no pet.); *Macias v. State*, 649 S.W.2d 150, 152 (Tex.App. – El Paso 1983, no pet.) (citing *Consuelo-Gonzalez*, 521 F.2d at 265 and *Basaldua v. State*, 558 S.W.2d 2, 7 (Tex.Crim.App.1977)); *Tamez*, 534 S.W.2d at 692. Although a probationer has a diminished expectation of privacy by virtue of the "conditions," his rights may be diminished only to the extent necessary for his reformation and rehabilitation. *See Owens v. Kelley*, 681 F.2d 1362, 1367-68 (11th Cir.1982); *Tamez*, 534 S.W.2d at 692. Probationers simply do not enjoy the absolute liberty to which every citizen is entitled, but only conditional liberty properly dependent on observance of special supervisory restrictions. *See United States v. Tonry*, 605 F.2d 144, 150-51 (5th Cir.1979); *Consuelo-Gonzalez*, 521 F.2d at 265; *Basaldua*, 558 S.W.2d at 7; *Tamez*, 534 S.W.2d at 692; *Lee*, 952 S.W.2d at 899; *Harrison v. State*, 929 S.W.2d 80, 82-83 (Tex.App. – Eastland 1996, pet. ref'd); *Macias*, 649 S.W.2d at 152. The goals of community supervision require and justify the exercise of supervision to assure that these conditions and restrictions are in fact observed. *See Lee*, 952 S.W.2d at 899; *Harrison*, 929 S.W.2d at 83.

As warrantless search conditions, (h) and (gg) seek to rehabilitate appellant in two ways. First, they seek to dissuade him from possessing or viewing sexually explicit material. This is accomplished by making appellant cognizant that unlawful possession can be discovered at any time. Second, the conditions promote appellant's rehabilitation by providing his probation officer with a practical mechanism to determine whether rehabilitation is, in fact, occurring. We do not find that terms (h) and (gg) are unreasonable.

Turning to *Consuelo-Gonzalez* and *Tamez*, the cases relied upon by appellant, the conditions in these cases required probationers to consent to any search by law enforcement. Here, neither term (h) or (gg) is so broad in scope. Instead, the conditions imposed in the present case only require appellant submit to search requests by the supervision officer. In addition, any such search is limited in scope to the material expressly listed in those conditions.

However, a plain reading of the second sentence of term (gg) requires that appellant submit to the supervision officer's request to search his employer's computers, electronic equipment, and storage mediums. Appellant cannot agree to such a search. The protectable privacy interest, if any, in these items would belong to appellant's employer and not appellant. We sustain appellant's challenge to the second sentence of term (gg) and order that the second sentence of condition (gg) be deleted from the list of his supervision conditions. Accordingly, we overrule appellant's fifth point and that portion of point nine

dealing with condition (h) and the first sentence of condition (gg). Conversely, we sustain the portion of point nine dealing with the second sentence of term (gg).

B. No Relationship to the Convicted Offense

In point six, appellant argues that condition (h) does not reasonably relate to his conviction; therefore, the court abused its discretion by imposing the condition. We disagree.

While having access to sexually explicit material is not in and of itself a crime, condition (h) does have both a reasonable relationship to the crime and to appellant's future criminality. Appellant was convicted of sexual offenses (indecency with a child), and condition (h) prevents him from having access to material related to the offense for which he was convicted. Furthermore, the complained-of condition is reasonably related to his future criminality. By prohibiting him access to sexually explicit material, the goal is to make it less likely that in the future, appellant would commit additional sexual offenses. We overrule point six.

C. Improper Delegation of Authority

In point seven, appellant challenges eleven conditions of his community supervision as improper delegations of authority to the supervision officer.

Only the court in which the defendant was tried can fix the terms and conditions of community supervision. *See* tex.Code Crim. Proc. Ann. art. 42.12, § 10(a); *see also DeLeon v. State*, 466 S.W.2d 573, 574 (Tex.Crim.App.1971);

Stephens v. State, 983 S.W.2d 27, 30 (Tex.App. – Houston [14th Dist.] 1998, no pet.). Absent enumerated exceptions, this authority may not be delegated to a supervision officer or anyone else. *See* Tex.Code Crim. Proc. Ann. art. 42.12, § 10(a), (d); *DeLeon*, 466 S.W.2d at 574; *Stephens*, 983 S.W.2d at 30. If the supervision officer is permitted to determine the terms of community supervision, it is an unauthorized delegation of the trial court's authority. *See Cox v. State*, 445 S.W.2d 200, 201 (Tex.Crim.App.1969); *Stephens*, 983 S.W.2d at 30. Conditions should be clearly set out by the judge granting community supervision. *See Cox*, 445 S.W.2d at 201; *Stephens*, 983 S.W.2d at 30.

We begin by noting that article 42.12, section 11 specifically provides that conditions of community supervision may include requiring a defendant to submit to testing for alcohol or controlled substances. Allowing the supervision officer to establish when the testing occurs introduces an element of randomness necessary to insure appellant's compliance. We therefore do not believe that allowing the supervision officer to designate when testing is to take place is an improper delegation of the trial court's authority.

Similarly, article 42.12, section 13B provides for terms (j), (ii), (jj), and (kk). Under that section, a court is required to establish a "child safety zone" mandating that the probationer may not enter the zone. tex.Code Crim. Proc. Ann. art. 42.12, § 13B(a)(1). Subsections (f) and (g) further provide that a supervision officer may permit a probationer to enter a zone on an event-by-event basis under certain enumerated exceptions and that a supervision officer's discretion in permitting a defendant to enter the "zone" is not prohibited by section 10(a). *Id.*

§ 13B(f), (g). The complained-of terms are not inconsistent with the conditions set out in subsection (f); accordingly, the trial court's imposition of those terms is not an abuse of its discretion.

Next we turn to appellant's challenge of condition (nn) that requires him to participate in a house arrest program and to wear electronic monitoring equipment. The condition mandates appellant be confined to his home at all times unless he is performing a court-approved activity. The condition also requires appellant to abide by the written schedule given to him by his supervision officer. Appellant's contention is that the supervision officer's ability to designate a schedule is error. We do not agree.

Several terms of appellant's supervision require that he undergo testing and treatment. Additionally, several terms also contemplate appellant's employment. Adherence to these terms necessitates, or at a minimum contemplates, that appellant will leave his home. These are the court-approved activities mentioned in condition (nn). The supervision officer's ability to designate a schedule facilitates both appellant's confinement and participation in court-approved activities. We do not find condition (nn) to be an improper delegation of authority.

Relevant to (h) and (gg), appellant argues that these conditions allow the supervision officer to define "sexually explicit" or "sexually stimulating" material; thereby, improperly delegating the trial court's authority to the supervision officer. Additionally, appellant complains that term (aa) requires him to submit to clinical testing

and because the testing is to be directed by the supervision office and the sex offender treatment provider, it is an improper delegation.

These conditions do not violate the general proposition that the duty and responsibility for determining conditions of probation rests squarely upon the judiciary and cannot be delegated. A court, by the very nature of its composition, is inherently incapable of directly implementing every detail of specified community supervision conditions. *See Jones v. State*, 571 S.W.2d 191, 193 (Tex.Crim.App.1978) (condition that probationer follow rules of and participate fully in treatment program was not invalid); *Stephens*, 983 S.W.2d at 30 (supervision officer and probationer were allowed to determine the probationer's monthly reporting date); *Vento v. State*, 724 S.W.2d 948, 951 (Tex.App. – Amarillo 1987, no pet.) (allowing mental health center to test and determine whether person convicted of D.W.I. had a drug or alcohol dependence and, if so, recommend to the probation office a mandatory course of treatment to be followed by defendant). After prescribing, with sufficient clarity, the requisites with which a probationer must comply, a court must, of necessity, use other entities to carry out the details of those requisites. *See Vento*, 724 S.W.2d at 951. In *Salmons v. State*, 571 S.W.2d 29 (Tex.Crim.App.1978), the court of criminal appeals recognized that pragmatic necessity when it upheld a condition of probation requiring a probationer to "attend the clinic and counseling programs prescribed by such authority [Cenikor Foundation] and to obtain a monthly report as necessary from

such authority for the probation office and not discontinue cooperating with such authority until he is dismissed from the foundation by competent staff personnel." *Id.* at 29-30. As were the conditions in this case, that condition was attacked as an improper delegation of judicial authority. The *Salmons* court, however, held that this delegated discretion is necessary:

> Although such a condition of probation vests in the treatment facility a certain degree of discretion with regard to the conduct of the probationer while a resident therein, such discretion is necessary if the facility is to be successful in its rehabilitative efforts. Furthermore, there is a clear distinction between rules imposed by a custodial treatment facility in furtherance of its rehabilitative function and the conditions of probation. We hold that in ordering a probationer to obey the rules and regulations of the community-based facility in which he is placed, a trial court does not thereby improperly delegate to the facility the authority to specify the terms of probation.

Id. at 30.

The reasoning in *Salmons* is applicable to the question in this case. Here, as in *Salmons*, the trial court in its community supervision conditions sufficiently and clearly stated the cooperation required of appellant to maintain his community supervision. The fact that the court allowed the supervision officer or treatment provider to prescribe an implementation of the conditions set by the court falls far short of allowing that officer to impermissibly designate an additional condition. *See Vento*, 724 S.W.2d at 951.

However, we do not reach the same conclusion for term (ll). Article 42.12 provides that if a defendant is required to register as a sex offender under chapter 62, then registration shall be a condition of community supervision. *See* Tex.Code Crim. Proc. Ann. art. 42.12, § 11(e). This was in fact a condition of appellant's supervision. Separate from that reporting requirement, term (ll) allows the supervision officer to decide when and if appellant is to notify others of his conviction. Moreover, the term allows the supervision officer to designate those parties that are to be contacted. We believe that such discretion is an improper delegation of the trial court's authority. Therefore, we sustain appellant's challenge to term (ll) and order that the condition be deleted from the list of his supervision conditions. We overrule the remaining portion of appellant's seventh point.

D. Vague, Indefinite, and Ambiguous

In his eighth point, appellant attacks terms (h), (bb), (ff), (gg), (ii), (jj), (kk), (ll), and (nn) as vague, indefinite, and ambiguous. Because we have struck term (ll) in its entirety, we will not address appellant's contention relevant to that term. In addition, because we struck the second sentence of term (gg), we will only address appellant's complaint relevant to the first sentence of that term. Appellant's point recasts his earlier contentions of improper delegation. In other words, because the supervision officer has some discretion in implementing the terms of his community supervision, the challenged conditions are vague or indefinite.

Community supervision is a contractual relationship between the trial court and the offender. Because the violation of the contract could result in the loss of the probationer's freedom, the conditions of supervision should be clear, explicit, and unambiguous so that the probationer knows what is expected and the authorities may know with certainty the parameters of that probationer's prescribed and permitted activities. *See Simpson*, 772 S.W.2d at 278; *Johnson v. State*, 672 S.W.2d 621, 623 (Tex.App. – Corpus Christi 1984, no pet.); *Franklin v. State*, 632 S.W.2d 839, 841 (Tex.App. – Houston [14th Dist.] 1982, no pet.).

Clearly, a defendant can only be penalized after he has received fair notice of the conditions of community supervision. Thus, for example, appellant could not be penalized for possession of sexually explicit material if he is not fairly informed of what constitutes sexually explicit material. The supervision officer's discretion in implementing the details of appellant's supervision does not in and of itself make the complained-of conditions vague. We overrule point eight.

E. Reconciliation of Families

In point ten, appellant contends that condition (bb) is unreasonable because it violates the public policy of reconciling families. Citing article 42.12, section 14, he argues that in the event that he divorced and a court granted him conservatorship, the supervision term imposed would fail after 90 days. tex.Code Crim. Proc. Ann. art. 42.12, § 14(a). Appellant's reliance is misplaced.

The provision regarding conflicts between terms of supervision and orders granting access to a child only applies to existing court orders granting access or possession. *See id.* We overrule appellant's tenth point.

F. Circumventing Community Supervision

In point eleven, appellant argues that term (nn) is unreasonable because confinement and monitoring circumvent the jury finding that community supervision rather than incarceration was proper. Appellant relies on the reasoning in *Ex parte Gingell,* 842 S.W.2d 284 (Tex.Crim.App.1992) (orig.proceeding) for support. There, the court held "the trial court could impose electronic monitoring only if it could incarcerate [the probationer] as a condition to his probation." *Id.* at 285.

We are not persuaded by appellant's argument. First, the statutory basis underlying the *Gingell* decision has been repealed. *See* Act of May 23, 1987, 70th Leg., R.S., ch. 1101, § 16, 1987 Tex. Gen. Laws 3750, 3767. Second, article 42.12, sections 11(a)(7) and (17) currently provide that a trial court may require a probationer remain within a specified place and submit to electronic monitoring. TEX. CODE CRIM. PROC. ANN. art. 42.12, §§ 11(a)(7), (17). We overrule point eleven.

G. Reasonably Related to Rehabilitation

In his final point, appellant contends that there is no evidence that either alcohol or drugs were involved in

committing the sexual offenses. Thus, he argues that condition (y) that requires urinalysis testing, is not related to his rehabilitation. We disagree.

According to terms (b) and (c) that appellant did not challenge, appellant is to refrain from using illegal narcotics and consuming alcoholic beverages. As a consequence, term (y) is a necessary mechanism to determine appellant's compliance with those terms. Moreover, because submission to a urinalysis examination is specifically provided for by article 42.12, section 11(a)(14), we do not find that the trial court abused its discretion by imposing that condition. TEX. CODE CRIM. PROC. ANN. art. 42.12, §§ 11(a)(14).

IV. CONCLUSION

Because appellant had no reasonable expectation of privacy in numbers dialed from his employer's telephone, and because the methods employed in tracing appellant's call did not violate statutory prohibitions against tracing, the trial court did not err in failing to suppress the challenged evidence. Because we conclude that the second sentence of condition (gg) and all of term (ll) are improper, the judgment of the trial court is reformed to delete those conditions. Appellant's convictions remain valid, and his community supervision continues subject to the remaining valid conditions and any other valid conditions the trial court, in its continuing jurisdiction, deems necessary to impose. As reformed, the judgment is affirmed.

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April 5, 2000
COA#: 02-98-00482-CR
RE: Case No. 2082-99
STYLE: MCARTHUR, CARYL THOMAS

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

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APPENDIX B